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No. 92

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, *Appellant*

v.

WIESENFELD WAREHOUSE COMPANY, *Appellee*

On Appeal From the United States District Court
For The Southern District of Florida

BRIEF FOR THE APPELLEE

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OPINION BELOW

The order of the District Court from which the United States has appealed is reported at 217 F. Supp 638 (SD. Fla., 1962).

QUESTION PRESENTED

It is submitted that the Appellant's statement of the "Question Presented" (Appellant's Brief, page 2) goes far beyond the record in this case and presents a hypothetical question for decision by this Court. For that reason we have

restated the Question Presented to conform to the record, as follows:

Whether Section 301(k) of the Federal Food, Drug and Cosmetic Act condemns the holding of food (after interstate shipment and before sale to the ultimate consumer) by a public storage warehouseman in a building which is "accessible to" pests where such food, in fact, becomes adulterated.

STATEMENT

The Appellee, a public storage warehouseman, was charged by criminal information with six violations of Section 301(k) of the Federal Food, Drug and Cosmetic Act, (21 U.S.C. 331(k)). The six counts differed only with respect to the particular shipment or product involved. In substance, each count charged (1) that the Appellee had received an article of food which had been shipped in interstate commerce; (2) that while the food was being held for sale, the Appellee caused it to be held in a building which was "accessible to" pests, thus exposing it to contamination with filth; and (3) that the food thereby became adulterated.

The District Court granted Appellee's motion to dismiss the information and ruled that "the statute, as it is presently written, is too vague and indefinite to apply to the mere act of 'holding' goods" in a building which is accessible to pests (R 11-12). It is from the judgment of dismissal that the government appealed.

ARGUMENT

I. *The scope of this appeal is limited to a determination of whether or not the District Court was correct in its construction of the statute as applied to its construction of the information.*

The government in its brief, has assumed that the information upon which the prosecution is founded, charges that the Appellee held food under *known insanitary* conditions, thus causing it to become contaminated. We respectfully suggest, however, that the only act alleged in the information to have been committed by Appellee was that of holding food in a building which was *accessible to pests* (R 2-8). The information does not charge, as the Appellant assumes, that the Appellee held food under "known insanitary conditions."

The judgment of the District Court from which this direct appeal has been taken clearly discloses that Court's construction of the information. The Court, in summarizing the allegations of the information, said:

The information alleges that adulteration was caused by the Defendant's act of holding certain food in its warehouse, which was accessible to rodents, birds and insects. (R. 11).

The District Court held that this act of holding food in a building accessible to pests was not a prohibited act within the meaning of Section 301(k).

We are not concerned here with the correctness of the District Court's construction of the information, but rather with its application of the law to its construction of the information. The jurisdiction of this Court on direct appeal is limited by 18 U.S.C. Section 3731, to determination of whether or not error was committed by the District Court in its construction of Section 301(k), and in its ruling that the statute does not make criminal the holding of food in a building which is accessible to pests. *United States v. Borden Co.* 308 U.S. 188, 84 L.Ed. 181 (1939); *United States v. Keitel*, 211 U.S. 370, 53 L.Ed. 230 (1908); *United States v. Jones*, 345 U.S. 377, 97 L.Ed. 1086 (1953). In *United States v. Jones*, supra, this Court correctly summarized the limits of its jurisdiction on direct appeal, saying:

The Criminal Appeals Act . . . strictly limits the scope of our jurisdiction over this appeal. We may only entertain questions relating to the construction of [the statute] and its applicability to this information. We cannot construe it de novo, for we are bound by the District Court's construction. 345 U.S. at 378, 97 L.Ed. at 1087.

Furthermore, Rule 10 of the Revised Rules of the Supreme Court of the United States limits the scope of an appeal to those questions "set forth in the notice of appeal or fairly comprised therein . . ." The notice of appeal in this case states the Question Presented as:

Whether an information which alleges that a public storage warehouse company . . . *caused the food to be held in a building that was accessible to rodents, birds and insects* and thereby caused the food to be exposed to contamination from these sources; and *that the act of causing the food to be so held* resulted in the foods being adulterated . . . charges "the doing of any other act" which constitutes a violation of 21 U.S.C. 331(k). (R. 16) (Emphasis supplied.)

This is a fair statement of the Question Presented here, but it does not encompass the Question Presented by the Appellant's brief.

The government argues that an information which alleges a holding of food under known insanitary conditions is a crime. We submit that the information alleges only a holding of food in a building "accessible to" pests.

It should be emphasized that the distinction which we urge is more than one of words. Under the information as construed by the District Court, the only proof of guilt required of the government would be (1) that food was held in a building which was accessible to pests, and (2) that it, in fact, became contaminated with a filthy substance. The Appellant's argument assumes that it would be necessary for the government to prove a known insanitary condition within the warehouse. This argument which is advanced by

the government for the first time in this Court, ignores both the charge contained in the information and the construction of that charge which was adopted by the District Court.

It is submitted that the scope of this appeal must be limited to a consideration of whether or not the mere holding of food in a building which is accessible to pests is *per se* a crime.

II. Section 301(k), when properly construed, does not apply to holding of food in a building which is accessible to pests.

The argument presented by the Appellant assumes that if a building is accessible to pests it is *per se* insanitary. We respectfully submit that any and every building is "accessible to" pests, and if we are to accept the Appellant's argument and carry it to its logical conclusion every building (except one which is hermetically sealed) would be insanitary as a matter of law. A warehouse is peculiarly accessible to pests because of the large doorways made necessary by the nature of its business, and because those doorways must stand open during the normal business hours when merchandise is being taken into and out of the warehouse. There is no known method of making such a building "inaccessible" to pests. It does not follow, however, that such a building is *per se* insanitary.

The effect of the Appellant's argument would be to impose criminal liability with its attendant fines and imprisonment upon any person having possession of food which has become adulterated. This criminal responsibility would exist, according to Appellant, notwithstanding freedom from fault or knowledge of possessor of that food. It was this position of the Appellant that evoked the comment of the District Court:

Congress may have intended the construction advocated by the prosecution, however, the statute as it is

written, is too vague and indefinite to apply to the mere act of "holding" goods. (R. 12).

The District Court, in an effort to avoid the question of whether or not the statute was unconstitutionally vague and indefinite, instead adopted a strict construction of the statute so as to exclude the act alleged to have been committed by the Appellant. We submit that the District Court was correct and that common sense in the reading of the statute commands that it not be construed in such a way as to make a criminal of every warehouseman in the land.

A broad construction of Section 301(k) is perhaps warranted by its purpose and its legislative history, but there is nothing in that purpose or history, or in the act itself, to indicate that Congress intended to inflict severe criminal penalties upon a person merely holding food if that food becomes contaminated.

The Appellant, on page 10 of its brief, argues:

"There is no doubt what Congress *meant* to say . . . Section 301(k), fairly read, gives ample warning that holding food under known insanitary conditions which may result in contamination is condemned."

We have no quarrel with this construction of the statute unless the Appellant is equating a building "which is accessible to pests" to a "*known insanitary* condition." It is perhaps the contention of the Appellant that this Court should take judicial notice of the fact that since all buildings are accessible to pests, that condition must be "known" to everyone; and further, that mere accessibility of the building to pests, renders it insanitary. If this is so, the government's "fair reading" of the statute again becomes unfair and untenable.

It is submitted that fairly read Section 301(k) which by its terms requires the doing of an act with respect to food while it is held for sale, would warn a person of normal intelligence that if he knowingly *does* something to a food that

he is holding for sale, criminal responsibility may fall on him if what he does may reasonably be expected to result in contamination of the food.

In the construction of the statute the phrase "the doing of any other act" follows an enumeration of active verbs—"alteration," "mutilation," "destruction," "obliteration" or "removal." All of these verbs imply some affirmative action on the part of the actor. The term "doing of any other act" also implies some action or activity—not a mere passive holding in a building which is merely accessible to pests. Contrary to the argument of the Appellant, the Court below did not hold, and it is not now, and never has been the contention of the Appellee that the term "the doing of any other act" is restricted to acts related to labeling. We contend only that a person of ordinary intelligence, in reading Section 301(k) would not be warned that criminal punishment would be inflicted upon him for passively holding food belonging to his customer if that food became contaminated while in his possession; that the doctrine of *ejusdem generis*, which is at best an aid to construction and a guide to understanding, requires that some positive act causing adulteration be committed by the person holding food for sale.

Furthermore, Section 301(k) is not applicable unless the food is being "held for sale." The statute is silent as to who must hold the food for sale. It is submitted that an ordinary and normal construction of the statute would require that the person charged with the crime hold it for sale.

A public warehouseman must take and hold merchandise belonging to his customer in the ordinary course of his business without knowing what the customer intends to do with it. It is apparently the Appellant's position that criminal responsibility must rest upon the intention of a third party. If the customer intends to consume food which he stores in the warehouse, the Act has no application; but if the customer intends to sell it, the warehouseman is subject to fines

and imprisonment. A simple change of another's intention over which the warehouseman has no control can make him guilty of a crime.

It is submitted that the term "held for sale" in ordinary usage, implies a degree of ownership and something more than naked possession. As this Court held in *McFeely v. Commissioner*, 296 U.S. 102, 80 L.Ed. 83 (1935):

In common understanding to hold property is to own it, 296 U.S. at 107, 80 L.Ed. at 88.

See also 40 C.J.S. 406, *Howell v. Commissioner* (5th Cir. 1944), 140 F.2d 765. It is the "common understanding" of the term which should govern its meaning in the construction of the statute. We concede that technicalities of the law of property should not determine the applicability of the statute with respect to the seizure of adulterated food, or with respect to prosecutions for shipping adulterated foods in interstate commerce where the statute does not require that the food be "held for sale", (which proposition is supported by the authorities cited by Appellant on page 13 of its brief). It does not follow, however, that criminal punishment should be inflicted upon one having only naked possession of food with no proprietary interest in, and no control over its disposition, where the statute specifically requires that the food be "held for sale."

It is submitted that the District Court was correct in adopting a strict construction of the statute to exclude the act of holding food under the circumstances alleged.

III. *Section 301(k) as applied to the acts of Appellee is too vague, indefinite and uncertain to be enforceable as a criminal statute.*

The District Court held that Section 301(k) would be unconstitutionally vague if construed in the manner advocated by the prosecution.

The question of vagueness or uncertainty in criminal

statutes has been considered by this Court in a multitude of cases from which has been derived a series of tests or standards of construction which should be applied in determining whether or not a criminal statute is so vague as to offend the provisions of the Fifth and Sixth Amendments to the Constitution of the United States. In *Connally v. General Construction Co.*, 269 U.S. 385, 70 L.Ed. 322 (1926), this Court said that in order for a penal statute to be valid,

The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, *in advance*, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another. 269 U.S. at 393, 70 L.Ed. at 329.

In *Lanzetta v. New Jersey*, 306 U.S. 451, 83 L.Ed. 888 (1939), this Court said:

No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. . . . And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. 306 U.S. at 453, 83 L.Ed. at 890.

These are the general rules to be applied. It is submitted that a statute such as the one here involved, which in general terms prohibits any act which *may* have an undesirable result, regardless of intent and purpose of the actor, is unconstitutionally vague.

This Court, in *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 65 L.Ed. 516 (1920), held that a statute which regulated prices and made criminal the wilful charging of an

unjust or unreasonable rate in handling necessities, was not sufficiently definite to withstand an attack on the grounds of vagueness. This Court held that a standard of guilt must be set forth in the statute and Congress had no power to delegate to the courts and juries the duty of fixing such standards. The Court pointed out that:

"... to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." 255 U.S. at 89, 65 L.Ed. at 520.

In the *Cohen* case the statute required a wilful act on the part of the accused. Here the statute as construed by the prosecution simply punishes any act which might have the undesirable consequence of adulterating food.

More recently, in *United States v. National Dairy Products Corp.*, — U.S. —, 9 L.Ed. 2d, 561 (1963), this Court upheld the validity of Section 3 of the Robinson-Patman Act which prohibits the sale of goods at "unreasonably low prices for the purpose of destroying competition." The Court held that the predatory intent required of a person charged under that statute afforded sufficient notice and warning of the prohibited conduct.

"... We think the additional element of predatory intent alleged in the indictment and required by the Act provides further definition of the prohibited conduct. We believe the notice here is more specific than that which was held adequate in *Screws v. United States*, 325 U.S. 91, 89 L.Ed. 1495, 65 S.Ct. 1031, 162 ALR 1330 (1945) in which a requirement of intent served to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." 9 L.Ed. 2d at 567.

In the instant case, the information contained no reference to intent which, if required, might serve to "relieve the

statute of the objection that it punishes without warning an offense of which the accused was unaware."

If Section 301(k) is construed to punish any act or omission which may have the undesirable consequence of contaminating food, every person coming in contact with food will be required to speculate as to what acts may be prohibited and what omissions will be punished. The statute, it is submitted, does not define with the required particularity the standards of conduct expected and demanded, and therefore, if construed as contended by the Appellant, is unconstitutionally vague and indefinite.

CONCLUSION

In conclusion, it should be noted that the United States has ample power and authority to protect the stream of interstate commerce from pollution by adulterated foods through a vigorous use of the seizure provisions of Section 304(a) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 334(a)). That section of the Act clearly and unequivocally grants to the government the power to seize and destroy adulterated foods in the stream of commerce. But the government here seeks to impose severe criminal sanctions against a bailee of food whose only fault is that his building is "accessible to" pests, and who is, by the very nature of his business powerless to avoid that condition regardless of what precautions he takes to protect against invasion by such pests.¹

¹ The government concedes that in the fifteen years that Section 301(k) has been in effect there have been no reported criminal prosecutions for activity even related to that alleged in the information. Of the two cases cited by the government (Appellant's Brief, page 11, fn 3) as bearing on the question, one is a civil proceeding wherein the United States sought an injunction against poisoning of food by an exterminator (*United States v. International Exterminator Corp.*, 5th Cir., 1961) 294 F. 2d 270), and the other, an unreported District Court case involving a prosecution of wholesale grocery warehouse for storing food near insect-infested food after repeated warnings from the inspector. Neither of these cases even approach the broad construction of the statute which the government seeks here. Furthermore, in the fifteen years of the statute's existence, the Department of Health, Education and Welfare, and its predecessors, have not seen fit to propound any administrative guidelines or regulations bearing on the Question Presented by the prosecution..

We again point out that notwithstanding the broad statements in the government's brief, the information as construed by the District Court does not allege that Appellee is a wholesale grocery warehouse (which it is not), nor the existence of any insanitary condition in the Appellee's warehouse; nor does it allege any knowledge on the part of the Appellee of the existence of pests in the building; nor that the Appellee did anything with respect to the food other than hold it in a building which was accessible to pests.

Under the construction of Section 301(k) advocated by the Appellant at any time a food product is attacked by insects or pests, the possessor of the food has committed a crime. The accessibility of the place where the food is stored to insects is proved by the fact that the food is attacked, and adulteration of the food is proved by the fact that the food was held in a place accessible to insects. If absolute criminal liability was intended to be imposed by Congress under such circumstances the language of the statute and its legislative history do not convey that intention.

It is submitted that the District Court was correct in its holding that the statute was inapplicable to facts alleged in the information and for the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Clarence G. Ashby, attorney for Wiesenfeld Warehouse Company, Appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the.....day of October, 1963, I served copies of the foregoing Brief for the Appellee, the United States of America, by mailing copies thereof in a duly addressed envelope with airmail postage prepaid to Archibald Cox, Solicitor General, United States of America, Department of Justice, Washington 25 D. C., attorney of record for Appellant.

Attorney for Appellee